Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Expedited Declaratory Ruling Or,	)	**CG Docket No. 02-278**
In the Alternative, Request for Retroactive	)	
Waiver	)	
	)	
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	

COMMENTS OF THE INSIGHTS ASSOCIATION

Stuart L. Pardau
LAW OFFICES OF STUART L. PARDAU & ASSOCIATES
11500 W. Olympic Blvd., Suite 340
Los Angeles, CA 90064
stuart@pardaulaw.com

Howard Fienberg
Director of Government Affairs
THE INSIGHTS ASSOCIATION
1156 15th Street NW, Suite 302
Washington, D.C. 20005

Counsel to the Insights Association

Date: January 22, 2019

I. INTRODUCTION

On behalf of the Insights Association ("Insights"), I am writing to express my support for the petition for declaratory ruling (the "Petition") filed with the Federal Communications Commission (the "Commission") on December 17, 2018 by SGS North America, Inc. ("Petitioner"). Insights represents more than 4,000 members across the United States, and is the

leading nonprofit trade association for the marketing research and data analytics industry.[1] Since Insights filed a petition in October 2017 asking the Commission to clarify the meaning of "dual-purpose" calls, as well as the distinction between telemarketing and non-telemarketing communications, the need for FCC guidance on these questions has only grown more urgent.[2]

As Petitioner describes, and as Insights has argued in the past,[3] over-aggressive litigators have repeatedly misrepresented the Commission's direction regarding the scope of "telemarketing" and "dual purpose" calls under the Telephone Consumer Protection Act ("TCPA"), making "legitimate businesses…targets for costly frivolous litigation that advances no policy goals of the TCPA."[4] Unfortunately, a number of courts have even found that any communication which bears some distant, attenuated relationship to the profit motive is presumptively a form of "telemarketing" or an "advertisement."[5]

Because confusion on these issues goes all the way up to the Circuit Court level,[6] the recent ruling against Petitioner, while unfortunate, is not surprising. The plaintiff's argument in

---

[1] The Insights Association was formed through the merger of the Marketing Research Association ("MRA"), founded in 1957, and the Council of American Survey Research Organizations ("CASRO"), founded 1975. More information can be found at www.insightsassociation.org.

[2] *See* Petition of The Insights Association and the American Association for Public Opinion Research, CG Docket No. 02-278, (filed Oct. 30, 2017) (hereinafter "Insights Petition") ("[C]ourts have recently begun conflating telemarketing and research or other non-marketing communications, apparently based on the notion (offered without citation to the TCPA, or the Commission's regulations or prior rulings) that any communication which bears some distant, attenuated relationship to the profit motive is presumptively a form of 'telemarketing' or an 'advertisement.'").

[3] *Id.* at *8.

[4] Petition at *4.

[5] *See* Insights Petition at *8-*15; *see also* Order Re: Defendants' Joint Motion for Summary Judgment, *Samuel Katz v. American Honda Motor Co., Inc.*, No. 2:15-cv-04410 (C.D. Cal. May 12, 2017) ("The evidence demonstrates the calls to Plaintiff were advertising because they were made for customer service purposes and to increase future sales and revenue."); *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F.Supp.3d 482, 493 (W.D. Mich. 2015) ("It stands to reason that the information referenced on the fax could have led primary care physicians to refer more patients or discuss orthopedic products more frequently, and this in turn could stimulate demand for Defendants' products.").

[6] *See Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 847 F.3d 92 (2d Cir. 2017) (finding that a seminar invitation constituted an advertisement under the TCPA in part because "[b]usinesses are always eager to promote their wares and usually do not fund presentations for no

the SGS case that "maintaining a positive relationship with customers" created a "dual purpose," and the court's acceptance of this argument at the pleading stage, is precisely in line with the wrongheaded cases highlighted by Insights previously, and now by Petitioner.[7]

As Insights has argued in the past, and reiterates here, if litigators and courts can characterize a communication which might ultimately improve customer relations as an "advertisement" or "telemarketing", then there will hardly be *any communication* between businesses and customers which will not be subject to the TCPA's telemarketing rules. This result is in direct conflict with the stated aims of the TCPA's drafters, who sought to balance "individual privacy rights" with "commercial freedoms of speech and trade"[8]—and also, of course, in direct conflict with the Commission's previous guidance, which has consistently "sought to to protect consumers *without inhibiting legitimate business communications*."[9]

Again, the need for the Commission to weigh in on these matters is urgent. The deluge of abusive TCPA litigation, of which the SGS case is yet another example, has chilled legitimate communications which are designed to benefit both businesses and consumers. Insights members are all too aware of this chilling effect, and of the grave financial threat TCPA litigators pose to small and medium-sized firms in particular. Accordingly, we appreciate the opportunity to comment.

---

business purpose"); *but see Sandusky Wellness Center, LLC v. Medco Health Solutions, Inc*., 788 F.3d 218 (6th Cir. 2015) ("[t]he fact that the sender might gain an ancillary, remote, and hypothetical economic benefit later on does not convert a noncommercial, informational communication into a commercial solicitation.").

[7] Petition at *4.

[8] *See* H.R. Rep. No. 102-317 at *2.

[9] *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991,* Report and Order*,* 27 FCC Rcd. 1830, *9, ¶ 5 (2012) (emphasis added).